No. 05-1539

Supreme Court, U.S.
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In The
Supreme Court of the United States

JONAS EKLUND, *et al.*,

Petitioners,

v.

BYRON UNION SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause is violated when a public elementary school has students adopt the persona of a member of a religion and act out religious activities and practices under the guise of cultural education?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership public interest legal foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the country. Most of MSLF's members, however, live and work in the eleven States of the American West; as a result, for economic and recreational purposes, they must make use of the federal lands that predominate in the West.

For more than a decade, the ability of MSLF's members to engage in such economic and recreational pursuits has been constrained by decisions of federal land managers to accede to the demands of American Indian religious

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

practitioners that certain federal lands are sacred and must be closed to non-Indians. Consistently, MSLF has challenged those closures as a violation of the Establishment Clause, including in *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999); *Rocky Mountain Oil and Gas Ass'n and Independent Petroleum Ass'n of America v. U.S. Forest Service*, 2001 WL 470022 (9th Cir. 2001); *Natural Bridge and Arch Society v. Alston*, 98 Fed. Appx. 711 (10th Cir. 2004); *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004); and *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004). Because of this interest in Establishment Clause jurisprudence, MSLF joins the Petitioners in requesting that *certiorari* be granted.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amicus hereby adopts Petitioners' description of the decisions below, statement of jurisdiction, and statement of the case. *See* Petition at 1-16.

SUMMARY OF THE ARGUMENT

This Court should grant *certiorari* in this case for two reasons. First, the Ninth Circuit implicitly decided an important federal question concerning the Establishment Clause in a way that conflicts with this Court's interpretation of the Establishment Clause. Specifically, the Byron Union School District, a public school district, compels students to participate in an Islamic role-play unit. This unit immerses students directly in religious exercises,

even if the exercises do not exactly emulate the tenets of Islam. Yet, the Ninth Circuit held that no Establishment Clause violation existed. This Court should grant *certiorari* to reverse that decision, which is in clear conflict with this Court's precedents that prohibit compelled religious exercises or compulsory religion generally.

Second, this Court should grant *certiorari* to clarify the status of Establishment Clause jurisprudence, an important federal question. The Byron Union School District's Islamic role-play unit teaches facts and beliefs of the religion of Islam. The Ninth Circuit implicitly held, however, that this lesson was cultural and historical and not religious. This Court should grant *certiorari* and conclude that government coercion regarding religion does not escape application of the Establishment Clause merely because the subject religion is intertwined with the history and culture of that religion and its adherents.

ARGUMENT IN SUPPORT OF PETITION

I. THIS COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION BECAUSE IT CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE.

A. The Byron Union School District Violated The First Amendment By Coercing Students To Participate In A Religious Exercise.

In *Lee v. Weisman*, 505 U.S. 577, 587 (1992), this Court declared, with regard to Establishment Clause claims in public schools: "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government

may not coerce anyone to support or participate in religion or its exercise. . . . "[2]

1. The students were coerced into engaging in the Islamic role-playing unit.

This Court has held that religious activities that are "held in [public] school buildings under the supervision and with the participation of teachers employed in those schools" violate the Establishment Clause. *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). Further, the ability to refrain from the religious activity does not negate the coercive effect of religion in public schools. *Engel v. Vitale*, 370 U.S. 421, 430-432 (1962) (holding that a prayer at the beginning of a school day violates the Establishment Clause even if students are permitted to remain silent or leave the classroom). This Court explained that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure . . . is plain." *Id.* at 431. Likewise, the students in the Byron Union School District were coerced into engaging in the Islamic role-playing unit in spite of the purported ability to opt-out of the unit.

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[2] This Court has developed three related but distinct tests to evaluate Establishment Clause claims: the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); the *Lynch* test, *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring); and the *Lee* test, *Lee*, 505 U.S. 577, 587. Only *Lee* applies in the context of alleged religious activity in a public school; therefore, *amicus* will only apply the *Lee* test.

2. The students were engaged in "religious exercises" even if those exercises did not satisfy each and every aspect of the Islamic religion.

The district court held, and the Ninth Circuit implicitly affirmed, that the students in the Byron Union School District did not perform any religious exercises. Instead, the court held that students participated in activities that, although analogous to Islamic religious practices, "were not actually the Islamic religious rites." Petition Appendix at 18-19. The children in the Byron Union School District adopted Muslim names, as Americans converting to Islam would, memorized and recited Muslim prayers to "analogize" religious worship, gave up a meal or snack to honor Ramadan, read from the Koran, and took a "pilgrimage" to Mecca. The district court compared these classroom activities to the practice of "devout Muslim practitioners" and concluded that anything less than the latter would not constitute a religious exercise. As such, the students' activities were merely "approximations" of the Islam religion. *Id.*

This holding and the Ninth Circuit's affirmance of it conflict directly with this Court's ruling in *Lee* where this Court held that an act constitutes a religious exercise if a reasonable person objectively could believe that the act signified participation or approval of the exercise. 505 U.S. at 593. In *Lee*, this Court held that a nonsectarian graduation prayer by a rabbi constituted a "religious exercise" because a reasonable person at the graduation could have believed that religion was being practiced. *Id.*

The district court's view that the activities in which the children were required to engage "were not actually the Islamic religious rites" is flawed. Even among

Muslims, there is no small disagreement as to what activities are true "Islamic religious rites" and what activities only "approximate" those rites. For example, Islamic law requires that Muslims pray five times a day facing Mecca. Petition Appendix at 18. Yet, many Muslims "approximate" this requirement and pray less often. *See* http://www.beliefnet.com/story/191/story_19198_1.html (last visited June 20, 2006) ("Not all Muslims follow their religion's rules on praying five times a day."). Nonetheless, a reasonable person would conclude that these Muslims participate in religious practices when they do pray.

Similarly, the Ahmadis read from the Koran, which they believe is the literal word of God, worship Mohammed as the messenger of God, take pilgrimages to Mecca, fast during Ramadan, and consider themselves devout Muslims. http://www.alislam.org/ (last visited June 21, 2006); *Sahi v. Gonzales*, 416 F.3d 587 (7th Cir. 2005). Yet, unlike other Muslims, they do not believe that Mohammed was the last prophet. *Id.* This has caused some Muslims to denounce the Ahmadis' Islamic ties. *Id.* Nonetheless, most objective observers would conclude that reading from the Koran, worshiping Mohammed, taking pilgrimages to Mecca, and fasting during Ramadan constitute actual religious activities – not mere approximations of religion. Likewise, the Byron Union School District's Islamic role-playing exercise objectively constituted a religious practice.

Assuming *arguendo* that the Eklunds did not participate in a "religious exercise," the Islamic role-playing unit, nonetheless, violates the First Amendment, as interpreted by this Court in *Lee*. The *Lee* test provides: "[t]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise. . . . "

Lee, 505 U.S. at 587. The phrase "religion or its exercise" is written in the disjunctive. Therefore, the test prohibits the coerced participation in religion in a general sense, or participation in religious exercises.

The Byron Union School District's role-playing unit encouraged the students to "become Muslim" and taught various aspects of the religion itself. The purpose of the unit was not to clarify a secular historical or cultural lesson through an explanation of religion but, instead, to teach about the religion for its own sake. *See* Section II, following. Thus, regardless of whether the role-playing unit constituted an actual practice of a religious exercise, it nevertheless unconstitutionally amounted to coerced support for religion generally.

B. This Court Should Grant *Certiorari* Because The Holding Of The Ninth Circuit Conflicts With Decisions Of This Court.

As this Court enunciated in *Lee*, governments may not "coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. The Byron Union School District's role-playing unit, in which students were told "you and your classmates will become Muslims," Petition Appendix at 7, and in which students actively engaged in Islamic rituals – albeit not to the extent of some devout Muslim practitioners – was objectively a religious exercise, or, at a minimum, religion, and the students were coerced into participating in the Islamic role-play unit. As a result, the holding by the district court, which was affirmed by the Ninth Circuit, is in direct conflict with this Court's holding in *Lee*. Therefore, this Court should grant *certiorari*.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO DECIDE AN IMPORTANT FEDERAL QUESTION: WHETHER GOVERNMENT COERCION REGARDING RELIGION ESCAPES APPLICATION OF THE ESTABLISHMENT CLAUSE WHEN THE RELIGION IS INTERTWINED WITH THE HISTORY AND CULTURE OF THAT RELIGION AND ITS ADHERENTS.

The district court concluded, and the Ninth Circuit implicitly affirmed, that the Islamic role-playing unit was purely secular because it instructed students solely about the culture and history of Islam. Petition Appendix at 23-24.

This is not the first time that the Ninth Circuit has upheld government coercion regarding religion when religious faith is intertwined with history and culture. In *Cholla*, 382 F.3d 969, the Ninth Circuit concluded that federal protection of a site on private land regarded by some American Indian religious practitioners as sacred did not violate the Establishment Clause because, "protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole. . . . " *Id.* at 977. Specifically, the Ninth Circuit ruled, "[T]he Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups." *Id.*

That is not, however, the approach taken by the Ninth Circuit in a case decided three months earlier involving the constitutionality of a Latin cross erected on federal land in the California desert to commemorate those who died in World War I. In that case, the Ninth Circuit ruled

that, despite the historical and cultural significance of the Latin cross, the cross remained a symbol of the Christian faith and had to be removed. *Buono v. Norton*, 371 F.3d 543, 548-550 (9th Cir. 2004).

With its decision in the instant case, the Ninth Circuit has demonstrated, once again, that it does not apply the Establishment Clause jurisprudence of this Court consistently. As to religions whose history and culture are intertwined with matters of religious faith, the Ninth Circuit has held explicitly (in *Cholla*) and implicitly (in *Eklund*) that no Establishment Clause violation occurs when the public is coerced by government into respecting the religious orthodoxies of those religions. These holdings are in conflict with the rulings of this Court.[3]

Moreover, the Ninth Circuit's holding here is in conflict with the facts of the case. The materials used by the Byron Union School District in its Islamic role-playing unit were titled, "Islam: A simulation of Islamic history and culture." Petition at 2. Yet the unit neither presented a secular history lesson, nor did it address a particular culture.

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[3] That Judeo-Christian religion is intertwined with its adherents' "history" and "culture" has not saved purported government endorsement of that religion, for example, in the case of displays of the Ten Commandments, from application of the Establishment Clause. *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, ___ U.S. ___, 125 S.Ct. 2722 (2005). "In one key respect, the way the story of the United States has been told for the past one hundred years is wrong. It has cut off one of the two wings by which the American Eagle flies, her compact with the God of the Jews – the God of Israel championed by the nation's first Protestants. . . . Believe that there is such a God or not – the founding generation did, and relied upon this belief. Their faith is an 'indispensable' part of their story." Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* at 5 (Encounter Books 2002).

Islam is a religion; therefore, while the unit might have taught the history of Islam and its spread throughout the world, that is not what the unit taught. Instead, it taught the students to "become Muslims" by engaging in the "religious orthodoxy" of Islam. *Lee*, 505 U.S. at 592. Similarly, the role-play unit did not teach about culture. Islam is a religion; it is not a racial or cultural group such as "Arab" or "Persian."

Therefore, because the Islamic role-play unit in a public school was religious, regardless of its historical or cultural components, it violated the Establishment Clause. This Court should grant *certiorari* to reverse the decision of the Ninth Circuit and to clarify its Establishment Clause jurisprudence.

CONCLUSION

Mountain States Legal Foundation respectfully requests that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

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